KENNETH CHUNG KUO TING & ANOR v. JOHN TSANG SHING CHI & ANOR

COURT OF APPEAL, PUTRAJAYA
RAMLY ALI JCA
ANANTHAM KASINATHER JCA
ABDUL AZIZ ABDUL RAHIM JCA
[CIVIL APPEAL NO: S-02-2466-2010]
13 DECEMBER 2013

CIVIL PROCEDURE: *Judgments and orders – Judgment upon admission of fact – Pending and effective stay order granted earlier – Whether judgment could be entered until stay order set aside – Whether there was clear and unequivocal admission of facts – Rules of the High Court 1980, O. 27 r. 3*

CIVIL PROCEDURE: *Admission – Judgment on admission, application for – Whether clear and unequivocal admission – Whether facts and rebuttals show admission – Whether judgment could be entered before arbitrator's determination of issues – Whether application allowed – Rules of the High Court 1980, O. 27 r. 3*

CIVIL PROCEDURE: *Preliminary objection – Whether court should rule on preliminary issues – Matter originated from High Court in Sabah and Sarawak – Whether Court of Appeal competent to hear and determine appeal – Whether proper forum and procedure – Whether complied with – Federal Constitution, art. 4(4)*

Sedia Gaya Sdn Bhd ('Sedia Gaya'), the first defendant in the High Court, had entered into an agreement with the Municipal Council to build a central market in Tawau, Sabah and sub-contracted the works to Big Team Construction Sdn Bhd ('Big Team'), the first plaintiff. Pursuant to a deed of indemnity, the second and third defendants ('the appellants'), as the directors of the Sedia Gaya, were required to indemnify the second and third plaintiffs ('the respondents'), the directors of Big Team for money due to Big Team. When Big Team completed the project and forwarded its final claim, Sedia Gaya disputed the claim alleging that Big Team had breached the sub-contract agreement and therefore the indemnity liability did not arise. The plaintiffs therefore sued Sedia Gaya for the non-payment under the sub-contract agreement. Sedia Gaya obtained a stay of the action ('the stay order') and the matter was referred to arbitration. Whilst the arbitration proceedings was pending, the respondents applied under O. 27 r. 3 of the Rules of the High Court 1980 ('RHC') for, among others, judgment on admission be entered against the appellants on the ground that there was clear and unequivocal admission by the appellants in their affidavit in support of Sedia Gaya's application to stay the suit for reference to arbitration. The application was allowed by the Judicial Commissioner ('JC') and hence this appeal. The appellants' main complaint in the present appeal was that the JC had erred in law and in fact in entering judgment under O. 27 r. 3 of the RHC

against them based on an alleged unclear and equivocal admission by the appellants when there was a pending and effective stay order granted earlier. At the outset, the respondents raised a preliminary objection that the Court of Appeal was incompetent to hear and determine the appeal, which originated from a High Court in Sabah and Sarawak on the ground that the Constitutional (Amendment) Act 1994 that introduced, *inter alia*, arts. 121(1B) and 125A(1)(aa) to the Federal Constitution ('Constitution') was made without the concurrence of the respective Yang di-Pertua Negeri of Sabah and Sarawak in contravention of art. 161E(2)(b) of the Constitution.

Held (allowing appeal with costs)

Per Ramly Ali JCA delivering the judgment of the court:

(1) The preliminary objection raised by the respondents had the effect of challenging the validity of the Constitution (Amendment) Act 1994 in which the respondents sought to declare that the law is invalid and of no effect. The proper procedure to be adopted by the respondents was to first obtain leave of a judge of the Federal Court as stipulated under art. 4(4) of the Constitution. The Court of Appeal was not the proper forum to deal with the matter and therefore, the preliminary objection was overruled and dismissed. (para 17)

(2) The effect of the stay order was very clear, *ie*, all further proceedings in the action be stayed and the parties be referred to arbitration. The stay order was still in force when the JC made the order under O. 27 r. 3 of the RHC. In absence of any appeal against the stay order, any further proceedings instituted by the plaintiffs must be stayed pending determination of the dispute by the arbitrator or until the arbitration process was completed. The JC had no jurisdiction to make a further order in relation to the action, unless the stay order had been set aside. (para 21)

(3) The appellants' liability under the deed of indemnity depended on the arbitrator's finding as to whether the Big Team had breached the sub-contract agreement. It was also for the arbitrator to determine whether the appellants should indemnify the plaintiffs for non-payment of money allegedly due to them. In the absence of clear and unequivocal admission and as the matter was stayed and referred to arbitration, the judgment under O. 27 r. 3 of the RHC could not be entered against the appellants until after the arbitrator's determination of the issues. (paras 23, 25 & 26)

(4) In law, an admission must be clear and not simple evidence of some and unequivocal facts upon which the plaintiff would have to rely on to establish his cause of action. Where the facts and rebuttals show that an admission was not clear, the court would not invoke O. 27 r. 3 of the RHC. The subject matter of the O. 27 judgment related to the final payment on the work done under the same sub-contract agreement

between Sedia Gaya and the Big Team. The appellants disputed the amount and the so-called admission by the appellants in their affidavit was not clear and unequivocal. The JC had therefore erred in law and in fact in entering judgment under O. 27 r. 3 of the RHC against the appellants. (paras 22 & 28)

Bahasa Malaysia *Translation Of Headnotes*

Sedia Gaya Sdn Bhd ('Sedia Gaya'), responden pertama di Mahkamah Tinggi, telah memasuki satu perjanjian dengan Majlis Perbandaran untuk membina pasar besar di Tawau, Sabah, dan memberikan sub-kontrak kerja-kerja tersebut kepada Big Team Construction Sdn Bhd ('Big Team'), plaintif pertama. Menurut surat ikatan indemniti, defendan-defendan kedua dan ketiga ('perayu-perayu'), sebagai pengarah-pengarah Sedia Gaya, diperlukan untuk membayar ganti rugi kepada Big Team bagi wang yang terhutang kepada Big Team. Apabila Big Team menyelesaikan projek tersebut dan mengemukakan tuntutan akhirnya, Sedia Gaya mempertikaikan tuntutan tersebut dengan mendakwa bahawa Big Team telah melanggar perjanjian sub-kontrak dan dengan itu liabiliti indemniti tidak timbul. Plaintif-plaintif oleh itu menyaman Sedia Gaya atas kegagalan membayar di bawah perjanjian sub-kontrak. Sedia Gaya memperoleh penangguhan tindakan tersebut ('perintah penangguhan') dan perkara tersebut dirujuk kepada timbang tara. Sementara prosiding timbang tara masih berjalan, responden-responden memohon di bawah A. 27 k. 3 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') untuk, antara lain, penghakiman atas pengakuan dibuat terhadap perayu-perayu atas alasan bahawa terdapat pengakuan jelas oleh perayu-perayu dalam afidavit menyokong permohonan Sedia Gaya untuk penangguhan guaman bagi rujukan kepada timbang tara. Permohonan tersebut dibenarkan oleh Pesuruhjaya Kehakiman ('PK') dan oleh itu, rayuan ini. Aduan utama perayu-perayu dalam rayuan ini adalah bahawa PK telah terkhilaf di sisi undang-undang dan fakta dalam memasukkan penghakiman di bawah A. 27 k. 3 KMT terhadap mereka berdasarkan dakwaan pengakuan yang tidak jelas oleh perayu-perayu apabila terdapat penangguhan yang masih berkuatkuasa yang diberikan sebelumnya. Di awal perbicaraan, responden-reponden membangkitkan bantahan awalan bahawa Mahkamah Rayuan tidak kompeten untuk mendengar dan memutuskan rayuan, yang berasal dari Mahkamah Tinggi di Sabah dan Sarawak atas alasan bahawa Akta Perlembagaan (Pindaan) 1994 yang memperkenalkan, antara lain, per. 121(1B) dan 125A(1)(aa) Perlembagaan Persekutuan ('Perlembagaan') dibuat tanpa persetujuan Yang di-Pertua Negeri Sabah dan Sarawak yang bertentangan dengan per. 161E(1)(b) Perlembagaan.

Diputuskan (membenarkan rayuan dengan kos)
Oleh Ramly Ali HMR menyampaikan penghakiman mahkamah:

(1) Bantahan awalan yang dibangkitkan oleh responden-responden mempunyai kesan mencabar kesahihan Akta Perlembagaan (Pindaan) 1994 yang mana responden-responden memohon untuk mengisytiharkan

bahawa undang-undang tersebut adalah tidak sah dan tidak mempunyai kesan. Prosedur wajar yang perlu dipatuhi oleh responden-reponden adalah untuk memperoleh kebenaran seorang hakim dari Mahkamah Persekutuan seperti yang diperuntukkan di bawah per. 4(4) Perlembagaan. Mahkamah Rayuan bukan forum yang betul untuk mempertimbangkan perkara tersebut dan oleh itu, bantahan awalan ditolak.

(2) Kesan perintah penangguhan adalah sangat jelas, iaitu kesemua prosiding selanjutnya dalam tindakan tersebut ditangguhkan dan pihak-pihak dirujuk kepada timbang tara. Perintah penangguhan masih berkuatkuasa apabila PK membuat perintah A. 27 k. 3 KMT. Dalam ketiadaan apa-apa rayuan terhadap perintah penangguhan, apa-apa prosiding lanjut yang dimulakan oleh plaintif-plaintif mesti ditangguhkan sehingga pemutusan pertikaian oleh penimbang tara atau sehingga proses timbang tara selesai. PK tidak mempunyai bidang kuasa untuk membuat perintah lanjut berkaitan dengan tindakan tersebut, kecuali perintah penangguhan tersebut diketepikan.

(3) Liabiliti perayu-perayu di bawah surat ikatan indemniti bergantung kepada dapatan penimbang tara sama ada Big Team telah melanggar perjanjian sub-kontrak. Penimbang tara juga perlu memutuskan sama ada perayu-perayu perlu membayar ganti rugi kepada plaintif-plaintif bagi kegagalan membayar wang yang didakwa terhutang kepada mereka. Dalam ketiadaan pengakuan yang jelas dan oleh sebab perkara tersebut telah ditangguhkan dan dirujuk kepada timbang tara, penghakiman di bawah A. 27 k. 3 KMT tidak boleh dimasukkan terhadap perayu-perayu sehingga penimbang tara selesai memutuskan isu-isu tersebut.

(4) Dari segi undang-undang, sesuatu pengakuan mestilah jelas dan bukan keterangan mudah sesuatu fakta atau fakta jelas di mana plaintif boleh menyandar untuk membuktikan kausa tindakannya. Di mana fakta-fakta dan penafian menunjukkan bahawa pengakuan tidak jelas, mahkamah tidak boleh membangkitkan A. 27 k. 3 KMT. Subjek perkara penghakiman A. 27 berkait dengan bayaran akhir bagi kerja yang dilakukan di bawah sub-kontrak yang sama di antara Sedia Gaya dan Big Team. Perayu-perayu mempertikaikan jumlah tersebut dan pengakuan yang didakwa dibuat oleh perayu-perayu dalam afidavit mereka adalah tidak jelas. PK oleh itu telah khilaf di sisi undang-undang dan fakta dalam memasukkan penghakiman di bawah A. 27 k. 3 KMT terhadap perayu-perayu.

Case(s) referred to:

Affin Bank Bhd v. Successcom Enterprise Sdn Bhd [2009] 4 CLJ 764 CA ***(refd)***
Channel Tunnel Group Led v. Balfour Beatty Construction Ltd [1993] 1 MIER 664 ***(refd)***
Low Yoke Lan v. Ng Ooi Kiat [2001] 1 LNS 228 HC ***(refd)***
Sure Care Services Ltd v. At Your Request Franchise Group Ltd [2010] 3 NZLR 102 ***(refd)***
Vithal Kumar Jayaraman v. Azman Md Nor [2010] 3 CLJ 332 CA ***(refd)***

Legislation referred to:
Arbitration Act 2005, s. 10
Federal Constitution, arts. 4(4), 121(1B), 125A(1)(aa), 161E(2)(b)
Rules of the High Court 1980, O. 27 r. 3

For the appellants - Alex Decena (Wilson Lai Wai Shing with him); M/s Chin, Mirdin & Co
For the respondents - Peter Lee Kung Chung (Marzuki Spawi with him); M/s Lee & Assocs

[Appeal from High Court, Tawau; Civil Suit No: T(22) 49-2008]

Reported by S Barathi

JUDGMENT

Ramly Ali JCA:

[1] This is an appeal against the decision of the learned Judicial Commissioner of the High Court at Tawau, Sabah dated 14 June 2010 in giving judgment in favour of the first and second respondents (the second and third plaintiffs at the court below) based on the appellants' alleged admission of a disputed amount allegedly due to the first defendant, a sub-contractor company in the present action. In the decision, the learned Judicial Commissioner had allowed the first and second respondents' application to enter judgment on admission of liabilities against the appellants whereby the appellants were ordered to pay a sum of RM2,056,093.90 with 8% interest to the respondents.

[2] In this case, the first defendant (Sedia Gaya Sdn Bhd) as the contractor had entered into an agreement with the municipal council to build a central market in Tawau, Sabah. The works were sub-contracted to the first plaintiff (Big Team Construction Sdn Bhd) as a sub-contractor. The first and second appellants in this appeal, were directors in Sedia Gaya Sdn Bhd. They were respectively the second and third defendants at the High Court. The first and second respondents were directors in Big Team Construction Sdn Bhd and they were respectively the second and third plaintiffs at the High Court. For the purpose of this judgment, Big Team Construction shall be referred to as the first plaintiff, the first and second respondents shall be referred to as the second and third plaintiffs respectively; Sedia Gaya Sdn Bhd shall be referred to as the first defendant, and the first and second appellants shall be referred to as the second and third defendants respectively.

[3] There was a deed of indemnity (dated 12 May 1995) entered into between the parties whereby the second and third defendants as directors of the first defendant, were required to indemnify the directors of Big Team Construction Sdn Bhd (second and third plaintiffs in this action) for money due to the first plaintiff (Big Team Construction) for works carried out on the central market. The deed of indemnity stipulated that the second and third defendant were only liable to indemnify the second and third plaintiffs if the sub-contractor (first plaintiff) did not breach the sub-contract agreement or the contractor (first defendant) did not dispute the sub-contractor's claims for payment.

[4] The plaintiffs' claim against the defendants is based on cl. 2 of the deed of indemnity which reads:

> The First Party agree that they shall jointly and severally indemnify and keep indemnified the Second Party against the non-payment of any moneys due to the company for any part of the said works so long as the company shall not be in breach of any of the obligations under the said Agreement and/or the quantum of claims made by the company is not the subject or any dispute.

[5] The first plaintiff completed the project and forwarded its final claim for payment; but the first defendant disputed the claim on the grounds that the first plaintiff did not complete the works within time and had failed to carry out remedial works during the defective liability period as stipulated in the sub-contract agreement between them. The parties disagreed on the amount of payment due from the first defendant to the first plaintiff under the said agreement. In essence, the defendants alleged that the first plaintiffs had breached the sub-contract agreement and therefore the indemnity liability does not arise.

[6] The plaintiffs sued the first defendant for the said non-payment *vide* Civil Suit T(22) 49 of 2008 which was filed on 11 August 2008 claiming among others for RM3,191,473.74 which the plaintiffs alleged to be the final claim under the said sub-contract agreement.

[7] The sub-contract agreement in question entered into between the parties has an arbitration clause. Clause 22.1 provides:

> In the event of any dispute or difference between the Contractor and the company whether arising during the execution or after the completion or abandonment of the said works by the Company or after the determination of the employment of the Company under this Agreement (whether by breach or in any other manner) in regard to any matter or thing of whatsoever nature arising out of this Agreement or in connection therewith; then either party shall give to the other notice in writing of such dispute or difference and such dispute or difference shall be referred to arbitration under the provisions of the Arbitration Act 1952 or any statutory modification or re-enactment thereof for the time being in force.

At The High Court

[8] On 27 April 2009, the first defendant, obtained a stay of the first plaintiff's action which was granted by Clement Skinner J where it was ordered "that all further proceedings in this action instituted by the first plaintiff be stayed pursuant to s. 10 of the Arbitration Act 2005".

[9] The matter was then referred to arbitration whereby the KLRC had appointed an arbitrator to resolve the dispute between the first plaintiff and the first defendant. The arbitration proceedings was pending when the learned Judicial Commissioner made the order in question on 14 June 2010 (the subject matter of the present appeal).

[10] By a summons dated 22 April 2010, the second and third plaintiffs applied under O. 27 r. 3 of the Rules of the High Court 1980 ('RHC 1980') for, among others, judgment on admission be entered against the second and third defendants as claimed in the statement of claim for a reduced sum of RM2,056,093.90, on the ground that there was clear and unequivocal admission by the second and third defendants made in their joint affidavit in support of the first defendant's application to stay the suit for reference to arbitration. The second and third plaintiffs alleged that the second and third defendants had admitted the difference between the two sums *ie*, RM2,056,093.90 and RM3,191,473.74 as having raised a dispute to refer the matter to arbitration. The second and third plaintiffs contended that the lower sum of RM2,056,093.90 had been admitted by the first defendant *vide* the second and third defendants' joint affidavit. The second and third plaintiffs submitted that, by cl. 2 of the deed of indemnity, the second and third plaintiffs are therefore, entitled to claim the admitted reduced sum of RM2,056,093.90 for the non-payment of moneys allegedly due to the first plaintiff, and the quantum of claim made was not subject to any dispute since the said reduced sum had already been admitted *vide* the joint affidavit of the second and third defendants.

[11] On 14 Jun 2010, the learned Judicial Commissioner despite the matter had been earlier ordered on 27 April 2009 by Clement Skinner J, to be stayed and referred to arbitration, allowed the second and third plaintiffs' application in terms of the summons dated 22 April 2010 and entered judgment on admission against the second and third defendants for the sum of RM2,056,093.90 with interest and costs in favour of the second and third plaintiffs. On 23 June 2010, the second and third defendants filed an appeal against the said decision.

[12] In granting judgment in favour of the second and third plaintiffs' summons the learned Judicial Commissioner found that the second and third defendants had by putting forward the calculation of the first defendant without any reservation as evidence in their joint affidavit had thereby agreed unequivocally to indemnify the second and third plaintiffs; by cl. 2 of the deed of indemnity of the sum of RM2,056,093.90 and deemed admitted by them to be due from the first defendant to the first plaintiff. The learned Judicial Commissioner further observed that "there is nothing in the defendants' joint affidavit or the third defendant's affidavit bringing out evidence from the arbitration proceedings that the purported breach of the sub-contract by the first defendant or other issues against the first plaintiff has been referred to that arbitration".

[13] The learned Judicial Commissioner further held:

> There is no mention here at all about a dispute on the purported breach of contract or any form of counterclaim or other issues against the 1st Plaintiff from the 1st Defendant being referred to the pending arbitration proceedings.

A The court can only conclude from the foregoing that what is being submitted for arbitration is based on the original ground to support the stay ie, "the difference in the calculation of the account …" (from paragraph 6 of the Defendants' Joint 534 Affidavit) and not for breach of contract or counterclaim or other issues.

B With the corresponding effect that if the RM2,056,093.90 as calculated by them and given to the 1st Plaintiff as due then under clause 2 of the Deed of Indemnity, the 2nd and 3rd Defendants will have to indemnify the 2nd and 3rd Plaintiffs against the non-payment of any moneys due to the 1st Plaintiff from the 1st Defendant.

C **At The Court Of Appeal**

Preliminary Objection

[14] At the Court of Appeal, before us, learned counsel for the respondents at the outset, raised a preliminary objection that the Court of Appeal is incompetent to hear and determine the present appeal, which originated from
D a High Court in Sabah and Sarawak on the ground that the Constitutional (Amendment) Act 1994 (Act A885) (gazetted on 24 June 1994) that introduced, *inter alia*, arts. 121(1B) and 125A(1)(aa) to the Federal Constitution was made without the concurrence of the respective Yang di-Pertua Negeri of Sabah and Sarawak in contravention of art. 161E(2)(b) of
E the Federal Constitution. (Article 121(1B) provides for the establishment of the Court of Appeal; art. 125A(1)(aa) provides that the President of the Court of Appeal and a judge of the Court of Appeal may exercise all or any of the powers of a judge of the High Court; and art. 161E(2)(b) provides that any amendment to the Constitution that effect the operation of the Constitution
F as regards the constitution and jurisdiction of the High Court in Sabah and Sarawak, and the appointment, removal and suspension of judges of that court shall only be made with the concurrence of the Yang di-Pertua Negeri of the State of Sabah of Sarawak or each of the state concerned).

[15] The respondents' contention in their preliminary objection is that
G since the Constitutional (Amendment) Act 1994 which incorporated art. 121(1B) and art. 125A(1)(aa) into the Federal Constitution was invalid on the ground that such amendment was without the concurrence of the Yang di-Pertua Negeri of the State of Sabah or/and Sarawak as mandated under art. 161E. The respondents argued that by art. 159(1) of the Constitution,
H provisions of the Constitution may be amended by Federal Law subject *inter alia*, to art. 161E thereof.

[16] To the respondents, the Court of Appeal is therefore not constitutionally established in so far as the constitution and jurisdiction in Sabah and Sarawak; and therefore has no jurisdiction and incompetent to
I hear appeals from any decision originating from the decisions of the High Court in Sabah and Sarawak.

[17] To us, the preliminary objection raised by the respondents has the effect of challenging the validity of the Constitution (Amendment) Act 1994. In effect, the respondents are asking this court to hold or declare that the said law is invalid and of no effect. That being the case, the proper procedure to be adopted by the respondent is to first obtain leave of a judge of the Federal Court as stipulated under art. 4(4) of the Federal Constitution, before proceeding with the matter. In the present appeal, the respondents have failed to obtain such leave, but instead chose to raise it before us as a preliminary objection in the present appeal. Our Court of Appeal panel is not the proper forum to deal with the matter raised. On that ground we therefore overruled and dismissed the preliminary objection and proceeded to hear the substantive appeal on merit.

Substantive Appeal

[18] The appellants' main complaint in the present appeal is that the learned Judicial Commissioner erred in law and in fact in entering judgment of a sum of RM2,056,093.90 against them, in favour of the respondents based on an alleged unclear and equivocal admission by the appellants under O. 27 r. 3 of the RHC 1980 when there was a pending and effective stay order granted earlier (on 27 April 2009) by the same court to refer the matter to arbitration pursuant to s. 10 of the Arbitration Act 2005; and the arbitration had commenced on 13 November 2009 where parties were called to attend a first preliminary meeting and at the relevant date, the arbitration process has not completed and was still pending.

[19] It is not in dispute that a stay order in respect of the action was granted by Clement Skinner J on 27 April 2009, upon application made by the first defendant. The order was made after hearing counsels from both sides, the defendants and the plaintiffs. The effects of the order, based on its actual wordings is: "It is hereby ordered that all further proceedings in this action instituted by the first plaintiffs be stayed pursuant to s. 10 of the Arbitration Act 2005."

[20] The arbitration clause (cl. 22.1) of the relevant sub-contract agreement covers a wide range of disputes which can be referred to arbitration. It includes "any dispute or difference between parties in regard to any matter or thing of whatsoever nature arising out of the agreement or in connection therewith whether arising during the execution or after the completion or abandonment of the said works or after the determination of the employment under the agreement".

[21] The effect of the order is very clear ie, all further proceedings in the action in question be stayed and the parties be referred to arbitration. The stay order was still in force at the time when the learned Judicial Commissioner made the order under O. 27 r. 3 of the RHC 1980 on 14 June 2010 against the appellants. There was no appeal against the said order. Therefore any further proceedings instituted by the plaintiffs (including their application under O. 27 r. 3 of the RHC 1980) must be stayed pending

A determination of the dispute by the arbitrator or until the arbitration process completed. The learned Judicial Commissioner has no jurisdiction to make a further order in relation to the action, unless the earlier stay order has been set aside.

B **[22]** The subject matter of the O. 27 judgment granted by the learned Judicial Commissioner on 14 June 2010 in favour of the respondents relates to the final payment on the work done under the same sub-contract agreement between the first defendant and the first plaintiff. The second and third defendants disputed the amount as appeared in their statement of defence. The so-called admission as found in the appellants' affidavit dated C 5 November 2008 (encl. 10) is not clear and unequivocal. These paragraphs merely repeated what the plaintiffs had pleaded in paras. 11 and 12 of their statement of claim. In their pleadings, the second and third defendant had denied the said paras. 11 and 12 of the statement of claim. In law, an admission must be clear and not simple evidence of some and unequivocal D facts upon which the plaintiff would have to rely to establish his cause of action (see: *Vithal Kumar Jayaraman v. Azman Md Nor* [2010] 3 CLJ 332). Where the facts and rebuttals show that an admission was not clear, the court would not invoke O. 27 r. 3 of the RHC 1980. (see: *Low Yoke Lan v. Ng Ooi Kiat* [2001] 1 LNS 228 and *Affin Bank Bhd v. Successcom Enterprise Sdn Bhd* E [2009] 4 CLJ 764).

[23] Under cl. 2 of the deed of indemnity in question, the second and third defendants' liability to indemnify the respondents is conditional upon the first plaintiff not being in breach of the sub-contract agreement and/or the quantum of claims made by the first plaintiff is not the subject of any dispute. F Under cl. 3 of the same deed, it is expressly provided that the said deed of indemnity shall become void and have no effect if the first plaintiff commits any breach of any terms and conditions of the said agreement.

[24] The defendants in their statement of defence (para. 9(A), (B), (C)) as well as in their joint affidavit in support of their application dated G 5 November 2008 for a stay order under s. 10 of the Arbitration Act 2005 (para. 8(a), (b) and (c)) had repeatedly pleaded that the first plaintiff failed to complete the works in time, failed to complete the works on the extended time and failed to remedy the defects of the works during the defect liability period. Clearly, the defendants' pleaded case raised the issue as to whether H the first plaintiff was in breach of any terms and conditions of the sub-contract agreement in question. This would be one of the issues to be determined by the arbitrator.

[25] The second and third defendants' liability under the deed of indemnity depends on the arbitrator's finding whether the first plaintiff had breached the I sub-contract agreement or not. The judgment on admission under O. 27 r. 3 of the RHC 1980 cannot be entered against the second and third defendants under the deed of indemnity until the arbitrator finds that the first plaintiff was not in breach of any terms and conditions of the sub-contract agreement.

[26] The deed of indemnity also provides that the second and third defendants "shall give an indemnity against the non-payment of moneys due to the company (first plaintiff)". Once the claim has been disputed by the second and third defendants and there is no clear and unequivocal admission, and the matter was stayed and referred to arbitration, then it is for the arbitrator to determine whether there was "non-payment of moneys due to the company (first plaintiff)". Hence, the question as to whether the second and third defendants should indemnify the plaintiffs for non-payment of moneys allegedly due to them, can only be determined after the arbitrator has arbitrated and determined the first plaintiff's claim against the first defendant.

[27] Section 10 of the Arbitration Act 2005, makes it mandatory for the court to stay proceedings and to refer the parties to arbitration for determination of a dispute if all the requirements thereunder are satisfied: "shall ... stay those proceedings and refer the parties to arbitration ..." Lord Mustill in *Channel Tunnel Group Led v. Balfour Beatty Construction Ltd* [1993] 1 MIER 664 had said that where a remedy of the same kind as will ultimately be sought from the arbitrators, it is the duty of the court to respect the choice of arbitration tribunal and not to take out of the hands of the arbitrators the power of decision by them. As has been clearly stated by Andrews J in *Sure Care Services Ltd v. At Your Request Franchise Group Ltd* [2010] 3 NZLR 102: "to do otherwise might undermine the arbitration and would fail to recognize the prescriptive nature of the Arbitration Act".

Conclusion

[28] Based on the above considerations, it is our considered findings that the learned Judicial Commissioner erred in law and in fact in entering judgment dated 14 June 2010 under O. 27 r. 3 of the RHC 1980 against the second and third defendants, in favour of the second and third plaintiffs based on an unclear and equivocal admission allegedly made by the second and third defendants when there was a pending stay order still in force made earlier by the same court on 27 April 2009 under s. 10 of the Arbitration Act 2005 to stay all further proceedings and to refer the parties to arbitration. We therefore set aside the said order of the learned Judicial Commissioner dated 14 June 2010.

[29] We unanimously allow the appeal with costs of RM10,000 to the appellants (here and below) and we make an order that the deposit be refunded to the appellants.